Before the Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal Nos. 02 of 2008 and 95 of 2008

Dated : 24th March, 2009

Present : Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member

IN THE MATTER OF:

Appeal No. 02 of 2008

Purti Sakhar Karkhana Ltd.
2nd Floor, Khadi Gramudyog Building
Gandhi Sagar, Mahal
Nagpur – 440032

…. Appellant

Versus

1. The Tata Power Company Ltd.
Bombay House, 24, Homi Modi Street,
Fort Mumbai – 400001

2. Reliance Energy Ltd.
Reliance Energy Centre,
Santa Cruz (E), Mumbai 400055

3 Reliance Energy Trading Co. Ltd.
Reliance Energy Centre,
Santa Cruz (E), Mumbai 400055

4 Maharashtra State Electricity Transmission Co. Ltd.
Prakash Ganga, E- Block Bandra Kurla Complex
Bandra (E), Mumbai – 400051

5. Maharashtra State Electricity Distribution Co. Ltd.
Prakashgad, Bandra (E)
Mumbai – 400051

6. Maharashtra Electricity Regulatory Commission
13th Floor, Centre No0. 1, Wlorld Trade Centre
Cuffe Parade, Colaba, Mumbai – 400005

…. Respondents

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Mr. Bhanudas G. Kulkarni,
Counsel for the Respondent(s) : Mr. Vikas Singh, Sr. Adv. (ASG)
Mr. Ravi Prakash & Mr. Varun Agarwal,
Mr. Abhijeet Khare, Mr. Vikrant Gumare for Res.5
Ms. Alpana Dhake, Mr. H.S. Jaggi,
Mr. Hardik Luthra, Ms. Anita Rajora &
Mr. Alok Shukla for Resp. 4
Ms. Anjali Chandurkar & Ms. Smieeta Inna and
Mr. Shiv K. Sjuri for Resp. 2 & 3
Mr. Syed Naqvi for Resp. 2
Mr. S.P. Dharamadhikari for Resp. 3

Appeal No. 95 of 2008

M/s Yash Agro Energy Ltd.
'Sahas' 1st Floor,
64, Bajaj Nagar, Nagpur – 440010 (M.S.) … Appellant

Versus

Maharashtra State Electricity Distribution Co. Ltd.
Prakashgad, Bandra (E)
Mumbai – 400051 … Respondent

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Mr. Bhanudas G. Kulkarni,
Counsel for the Respondent(s) : Mr. Vikas Singh, Sr. Adv. with
Mr. Rahul Sinha
Mr. Ravi Prakash & Mr. Varun Agarwal,

JUDGMENT

Per Hon'ble Mr. A.A. Khan, Technical Member

We have two appeals before us. While Appeal No. 02 of 2008 filed by M/s Purti Sakhar Karkhana Ltd. (hereinafter referred to as 'PSKL') is directed against the impugned order of the Maharashtra Electricity Regulatory Commission (in short 'the Commission') passed on 17.12.2007, the Appeal No. 95 of 2008, filed by M/s Yash Agro Energy Ltd. (for the sake of brevity to be called as 'Yash Agro') challenges the impugned order dated 08.08.2008 of the Commission. In both the

appeals the respondent no. 5 Maharashtra State Electricity Distribution Company Ltd. (for short 'MSEDCL') a successor entity of Maharashtra Electricity Board (MSEB)is involved as the main rival party.

2. The Appellants had separately executed sale/purchase agreements called Energy Purchase Agreement ('EPA') with respondent no. 5 MSEDCL to sell electricity generated from their respective generating plants to MSEDCL. As both the aforesaid appeals primarily relate to the common issue of interpretation of Clause 7.4 of the EPA executed by the appellants with MSEDCL, they are taken up together by us.

BACKGROUND

3. **Appeal No. 02 of 2008**

3.1 The Appellant PSKL owns a sugar factory and has also established a 22.5 MW capacity Bagasse – Based co-generation power plant. For sale of energy from its plant to erstwhile Maharashtra State Electricity Board (MSEB), the appellant has executed an Energy Purchase Agreement (EPA) with it on 02.09.2002. The said EPA is designed on the basis of the principles approved by the Commission in its order passed on 15.07.2002 which directed that all Energy Purchase Agreement will be in tune with them. The Commission by its order dated 16.8.2002 gave details explaining the rationale behind its order dated 15.07.2002 As per Clause 27.4.3 of the aforesaid order it was prescribed that the developer of co-generation and Non-conventional electricity generation plant should be allowed for third party sale from the beginning, if they choose to do so, and in that event MSEB shall stand relieved of its obligation to off-take energy from the plant. The Appellant not being in a position to pay in advance 50% of its share for connectivity with the grid, entered into a tripartite agreement with MSETCL and MSEDCL on 25.5.2006.

3.2. Clause 7.4 of EPA, accordingly prescribed the provision for third party sale. The appellant had supplied infirm power during testing and commissioning

phase from 18.03.2007 to 05.04.2007 to Respondent No. 5, MSEDCL. The Appellant in terms of clause 7.4 of the EPA opted on 31.01.2007 for third-party sale from 01.04.2007 and entered into an agreement for sale of energy from its Plant to Respondent NO. 3, Reliance Energy Trading Co. Ltd. (RETCL) and obtained open access from MSETCL. The tripartite agreement, however, did not effect on rights available to the Appellant under the EPA.

3.3 MSEDCL objected third party sale by the Appellant, PSKL without their obtaining 'No-Objection Certificate' from the former. The open access given initially by Maharashtra State Electricity Transmission Company Ltd. (MSETCL) to the Appellant for sale of energy to third party was withdrawn on a complaint made by MSEDCL. The appellant filed a petition for the resolution of the dispute before the Commission which was rejected by the Commission through impugned order passed on 17.12.2007. Aggrieved by the impugned order the appellant has filed the present appeal.

4. **Appeal No. 95 of 2008**

4.1 The Appellant Yash Agro has established biomass based co-generation power plant in district Chandrapur, Maharashtra after taking permission from Maharashtra Energy Development Agency (MEDA). The appellant in this appeal has also entered into an Energy Purchase Agreement on the similar line on 25.10.2004 as in the case of Appeal No. 02 of 2008. The concerned EPA also contained Clause 7.4 providing for sale of energy to third party by the appellant from the beginning itself, if it chooses to do so and was further subjected to the condition that in the event of third party sale MSEB will have no liability to off-take the energy generated by the plant. In pursuance of Clause 7.4 of the EPA, when the Appellant, Yash Agro opted for third-party sale on 19.05.2008, the permission was declined by the Respondent, MSEDCL by its letter dated 21.05.2008 on the ground that the Commission had deleted Clause 7.4 of EPA and advised the Appellant to inject entire energy in the State grid.

4.2 When the Plant was ready for testing and commissioning the Appellant approached the Commission with a petition to remove purported impediments relating to open access to transmission and evacuation facilities to enable it to commence the operation of its power plant for third party sale. In this appeal the appellant, Yash Agro had executed the agreement with MSEDCL but had not commenced testing and commissioning of the plant installed. The Commission disposed of the petition rejecting the claim of the appellant by its order dated 08.08.2008 on the ground that permission for third party sale should have been obtained prior to signing of the EPA. Aggrieved by the impugned order the appellant has filed the present Appeal No. 95 of 2008.

FACTUAL MATRIX

5.0 Both appeals namely appeal no. 02 of 2008 and appeal no. 95 of 2008 mentioned herein-above have the core issues grounded to interpretation of Clause 7.4 of the EPA relating to sale of energy from the respective power plant to third party. We, therefore, heard both the appeals together. We have given anxious hearing to the submissions made by learned counsel for the Appellants and the respondent and have referred to the documents submitted. In order to appreciate the controversy it is necessary to have a brief look on the facts relating to the cases before us.

5.1 The MERC through its order dated 15.07.2002, determined the power purchase and procurement process including the price for procurement of power by the MSEB from the co-generation stations using non-fossil fuel and prescribed the guidelines to aid the State Government in the formulation of State Policy in this matter. Salient paragraphs from the said order dated 15th July 2002 of MERC are reproduced below:

> ***'27.2 Approval of the Energy Purchase Agreement (EPA)***
> *It is not the intention of the Commission to approve EPA for each Co-generation project individually. The Commission has, therefore, formulated the*

principles of the EPA, which are elaborated in subsequent sections. The Commission hereby directs the MSEB to modify the Model EPA to reflect the tariff provisions and the principles of EPA as approved in this Order before executing the EPA with the developers. The Commission further directs the MSEB to submit the copy of the EPA executed in respect of each project within a period of 15 days from the date of such execution. Such EPAs should be made public.

27.3 Principles of EPA

The principles of EPA as approved by the Commission are as follows:

27.3.6 Tenure of EPA

The tenure of the EPA shall be for a span of thirteen years from the date of commissioning of the Co-generation project.

27.4.3 Third Party Sale

The developer of the Co-generation projects should be allowed to sell the energy generated by the Co-generation project, to third parties from the beginning itself, if they choose to do so. However, in such a situation, there should be no liability on the part of the MSEB to compulsorily off-take the energy generated by the project.

27.5 Applicability of the Order

The Commission hereby directs that this Order shall be applicable to the existing and the future co-generation projects (excluding incidental co-generation projects) based on the non-fossil fuel and commissioned before the end of tenth five year plan period (2002-2007) i.e. before 31.03.2007. (Emphasis original)'

6.0 The Commission through its order dated 16.08.2002 came out with detailed order explaining the rationale behind its Order of 15.07. 2002. Paragraph 2.24 of Order dated 16.08.2002 deals with the option of the developer to sell

power to third parties. The relevant extracts from paragraph 2.24 of the said are reproduced below:

> ***'2.24 Third Party Sale***
>
> *The Mumbai Grahak Panchayat has proposed that the Commission may consider permitting the co-generators to sell electricity directly to other consumers at mutually agreed prices and contract terms, after payment of specified wheeling/transmission charges to the MSEB. However, in such cases, the MSEB should not be bound to enter into an Energy Purchase Agreement for off-take of the entire generated power. This will offer the co-generators an option to sell the energy to any other purchaser, who is willing to offer a better price.*
>
> **Commission's ruling**
>
> *The Commission is of the view that the developer(s) of the co-generation projects should be allowed to sell to third parties, from the beginning itself, if they choose to do so. However, in such a situation, there should be no liability on the part of the MSEB to compulsorily off-take the energy generated by the project. Moreover, in order to protect the revenues of the MSEB, the projects will have to be sized in relation to the bagasse availability and such that substantial excess energy is not available, and the basic intention of the developer is to meet his captive energy requirement and sell only the surplus energy.*
>
> *The Commission is also of the view that the existing provision of third party sale in case of default by the MSEB, either in off-take or in payment should also be applicable to protect the interests of the developers, in case the developer opts to sell power to the MSEB only, from the initial stage itself.'*

7.0 Subsequently, the Appellant, PSKL, entered into similar EPA with MSEB/MSEDCL. Salient features of the EPA are reproduced below:

> ***'Definition:***
>
> *Commercial Operation of the Generation Facility will be deemed to occur on the date Generator delivers to MSEB a certificate stating that the Generation*

Facility is operating in accordance with Operating Procedures set forth in Schedule II.

Clause 5 Purchase of Energy units

(a)Normal Conditions

The purchase of energy units by the MSEB from the developer under the EPA shall be in the nature of infirm purchase of energy units. As regards supply of energy units by the developer to the MSEB is concerned; there shall be no limitation, except for Force Majeure conditions, on the maximum or minimum quantum of energy units to be supplied by the developer. In any case, it should not exceed the approved MW capacity of the plant. However, the developer must following (sic) grid discipline.

(b) Testing Conditions

(i) During the period of testing and commissioning of the Generation Facility, MSEB shall accept and purchase from generator, subject to the terms and conditions of this Agreement, all of the electricity that Generator makes available for delivery to MSEB at the Delivery Point.

(ii) Purchase of energy by MSEB during testing period i.e. up to Commissioning date, shall be at the rate of 90% of MSEB's average realization rate for previous financial year.

Clause 7. Tariff Rate and Tariff Structure

7.1 The tariff for the purchase of electricity by the MSEB from the co-generation project based on any non-fossil fuel (such as…) shall be Rs. 3.05 per kWh for the first year of operation of the co-generation project and the tariff shall be escalated at the rate of 2% per annum on compounded basis.

7.4 Third Party Sale

The developer of the Co-generation projects can be allowed to sell the energy generated by the Co-generation project, to third parties from the beginning itself, if they choose to do so. However, in such a situation, there should be no

liability on the part of the MSEB to compulsorily off-take the energy generated by the project.

8.4 Default provisions – third party sale

In case of any default by the MSEB, the developer shall be entitled to sale of energy to third party consumers. The MSEB shall facilitate such third party sale and enter into an Energy Wheeling Agreement with the Developer to enable such third party sale."

8.0 The Appellant, PSKL, in appeal No. 02 of 2008 and the Appellant M/s Yash Agro in Appeal NO. 95 of 2008 have both entered into a similar EPA with MSEB/MSEDCL the former on 02.09.2002 and the later on 25.10.2004

9.0 **Specific Facts relating to Appeal No. 02 of 2008**

9.1 The appellant after entering into EPA dated 02.09.2002 signed a connectivity agreement with MSETCL on 16.03.2007 and achieved the connectivity with the grid on 18.03.2007. The testing and commissioning phase of the plant started on 18.03.2007 and continued up to 05.04.2007. Infirm power during the testing and commissioning phase was supplied to MSEB/MSEDCL in accordance with Clause 5(b)(i) for which the MSEB/MSEDCL was to make payment @ 90% of MSEB/MSEDCL's average realization rate for previous financial year as specified in Clause 5(b)(ii) of EPA. Since the Appellant was not in a position to pay 50% of the cost of connectivity to the grid in advance, it executed a tripartite agreement with MSETCL and MSEDCL on 25.05.2006, for access to transmission and evacuation facilities.

9.2 The appellant on 31.01.2007 opted for third party sale in terms of Clause 7.4 of EPA for sale of energy to Reliance Energy Trading Company Ltd. (for short 'RETC') from 01.04.2007 with which it had executed a Power Purchase Agreement. The Appellant did not obtain any 'No-Objection Certificate' from MSEDCL. MSEDCL has objected on 21.07.2007 for third party sale on the ground that 'No-Objection Certificate' was not obtained earlier. The appellant

approached the Commission for resolution of dispute on 16.09.2007. On 27.09.2007 MSEDCL raised demand charges towards unscheduled interchange on the appellant and the same amounts was paid by the Appellant. MSETCL threatened disconnection on the open access on 31.10.2007. On 05.11.2007 MSEB/MSEDCL through petition no. 59 of 2007 to the Commission sought prohibitory order against the Appellant for third party sale. On 06.11.2007 MSETCL suspended open access as the Commission asked MSETCL to take independent decision about the open access. MSETCL permitted the appellant to inject power in grid without prescribing destination. The appellant filed the petition before the Hon'ble High Court on 13.11.2007. It agreed to inject electricity in grid and High Court directed all issues to be decided by the Commission. The matter was heard by the Commission and the impugned order dated 17.12.2007 was passed disallowing the claim of the appellant, PSKL for third party sale.

9.3 The Commission in the impugned order in Appeal No. 02 of 2008 also came to the conclusion that "*the applicability and enforcement of Clause 7.4 of the EPA cannot come to the rescue of PSKL, as PSKL has by its own volition chosen on one hand to sell power from "the beginning itself" to MSEB, and on the other hand billed MSEB at the rate determined by the Commission for the purchase of power as reflected in Clause 7 of the EPA. In fact, PSKL's actions of raising the bills at the rate of Rs. 3.05 per unit make it clear that PSKL wanted to supply to MSEB/MSEDCL from the beginning itself. PSKL submitted that it switched over to the third party and the defence put forward is that the supply to MSEB/MSEDCL was as testing and commissioning power. This argument is unsustainable and is hereby rejected. The argument that the EPA comes into force for a period 13 years from the date the generation facility begins commercial operation and not from any other date, deserves to be rejected in view of the language used in Clause 2"*

Both clauses 7.4 and 8.4 sufficiently entitled PSKL to sell electricity to RETCL. However, PSKL was required to act in accordance with the said clauses in order to entitle itself to the opportunity".

10. **Specific facts relating to Appeal No. 95 of 2008**

10.1 The Appellant Yash Agro had entered into EPA with MSEDCL on 25.10.2004. In pursuance of Clause 7.4 of EPA, the Appellant on 19.05.2008 opted for third-party sale. The Respondent, MSEDCL declined the third-party sale on the ground that Clause 7.4 of the EPA has been deleted by the Commission vide order dated 06.05.2008. Since MSEDCL and the State Load Dispatch Centre (SLDC) were not recognizing the right of third party sale of electricity by the Appellant from its plant from the beginning itself, the Appellant sought intervention of the Commission by filing a petition no. 93 of 2007 on 30.01.2008. The Commission in its order dated 06.05.2008 has held that Clause 7.4 of EPA was illegal, inoperative and un-enforceable being inconsistent with the principles of EPA as approved by the Commission in its order dated 16.08.2002. It also held that Clause 7.4 and 8.4 of the EPA operate in different circumstances and there was nothing in Clause 8.4 which precludes the Appellant from effecting third party sale from the beginning itself. Respondents MSETCL and MSEDCL were directed to enter into Energy Transmission/Wheeling Agreement with the Appellant to facilitate third party sale. The Appellant, Yash Agro accordingly informed MSEDCL on 19.05.2008 to complete all necessary facilities with a view to facilitate third party sale. MSEDCL however, vide letter dated 21.05.2008 informed the Appellant that Clause 7.4 of EPA was deleted by the Commission's order dated 06.05.2008 and, hence, there was no provision of third party sale by the Appellant. The Appellant was advised to inject the entire energy in the state grid in terms of EPA. The Appellant filed petition no. 25 of 2008 before the Commission complaining against it. The Appellant also filed a petition no. 28 of 2009 on 02.06.2008 and lodged complaint against MSEDCL under Section 142 read with Section 149 of the Electricity Act 2003. The Commission has disposed of both the aforesaid petitions on 08.08.2008 by rejecting the contention of the appellant stating that the decision for third party sale ought to have been taken before execution of the EPA and since the Appellant has already executed EPA it cannot opt for third party sale. The Commission in the impugned order has observed that Clause 7.4

of the EPA should not have been there at all as the EPA was supposed to be and required to be in accordance with the orders passed by the Commission on 15.07.2002 and 16.08.2002. It further ruled "*that Clause 7.4 in the EPA has been incorrectly introduced. If a developer had opted to sell to the third party from the "beginning itself" then the developer would not have entered into the EPA itself since EPA is a contract to buy and sell binding both the parties……"* It goes on further to hold that "*Clause 7.4 of the EPA dated October 25, 2004 is invalid, inoperative and unenforceable as it is inconsistent with the Principles of EPA approved by the Commission in its Order dated August 16, 2002".*

CONTENTION OF THE PARTIES

11.0 **Contention of the Appellant, M/s Purti Sakhar Karkhana (PSKL) in Appeal No. 02 of 2008.**

11.1 The Appellant, PSKL would make the following submissions:

11.1.1 As per the Order dated 15.07. 2002 of MERC, the developer of a co-generation project was permitted to sell the energy generated by the co-generation project to third parties from the beginning itself if it chooses to do so. This was subject to a rider that in such a situation there should be no liability on the part of MSEB to compulsorily off-take the energy generated by the project.

11.1.2 The Appellant, PSKL had the right to opt for third-party sale and in exercise of the said right it had entered into power purchase agreement with Reliance Energy Trading Company Ltd, Respondent no. 3 on 30.01. 2007, for one year with effect from 01.04.2007.

11.1.3 Vide letter dated 21.02.2007, the Appellant, PSKL *inter-alia*, informed MSEDCL about its PPA with Respondent no. 3 and also that MSEB will not have liability to purchase the power except the

power generated during the period of testing and commissioning, in this case till 31.03.2007.

11.1.4 The Plant was ready for testing and commissioning and accordingly Connectivity Agreement was executed with Respondent no. 4, Maharashtra State Electricity Transmission Company Ltd. (MSETCL) on 16.03.2007. The plant achieved connectivity with the grid on 18.03.2007, whereupon the testing phase started.

11.1.5 The testing and commissioning phase started on 18/03/2007 and continued up to 05.04.2007, when ABT meter was installed by Respondent no. 5. During the period of 18 days, Appellant supplied 548,130 KWh after operating for nearly 69 hours. During the period, the plant capacity was 540,000 KWh per day. The Appellant, PSKL contends that this was infirm power sale during the testing and commissioning period.

11.1.6 It was the responsibility of Respondent no. 5 to purchase the said power (power supplied during the period from 18.03.2007 to 05.04.2007), in terms of clause 5 (b) of the EPA. The Appellant billed the said energy sale @ Rs. 3.05 per KWh but contends that it was for MSEDCL to determine the rate for payment of the charges and the fact that Appellant had quoted the rate of Rs. 3.05 per KWh was hardly of any relevance as the Appellant, PSKL was not aware of average realization rate of the MSEDCL, in the preceding year, which was the basis for billing infirm supply in terms of clause 5 (b) of the EPA.

11.1.7 During the period, the Appellant also sold electricity for some days to Reliance Trading. With this the supplies to MSEDCL became less, for which Respondent no. 4 MSETCL "*raised demand of Rs. 39,60,676/- towards the unscheduled interchange for being paid to MSEDCL.*

The Appellant confirmed that *Respondent no. 5 being fully aware of the right of the Appellant to opt for third party sale had approved the action of the Appellant."*

11.1.8 In the meantime, the State Load Dispatch Centre refused open access for sale of power to Reliance Trading. The Appellant, PSKL took up the dispute with the Commission on 17.09.2007. Meanwhile MSEDCL also filed a petition with the Commission on 5.11.2007 in respect of issues connected with the matter. Subsequently, the Appellant filed detailed written note of arguments restricting to the issues relating to entitlement of the Appellant, PSKL to claim open access and the right to opt for the third-party sale. The Appellant submits that it had not given up other issues but only wanted the said two issues to be decided on priority and other issues could be kept pending. The MERC through its Order dated 17.12.2007 rejected the claim of the Appellant and upheld the claim of the MSEDCL. This order is challenged and is before us in appeal No. 02 of 2008. .

12.0 **Contention of the Appellant, Yash Agro Energy Ltd.**

12.1 The Appellant, YAsh Agro make the following submissions:

12.1.1 Clause 17.1 of the EPA signed with respondent NO. 5, MSEDCL. makes it mandatory that there would be no amendment to the EPA unless consented by both the parties in writing. MSEDCL and MSETCL had taken a definite stand that their consent would be necessary for a third-party sale. Hence, the Appellant, Yash Agro approached Commission seeking rights of third-party sale in terms of clause 7.4 of the EPA and provisions of the Electricity Act 2003. According to Appellant, Yash Agro, the Commission through its Order dated 6.05.2008 upheld the rights of the Appellant, Yash Agro to opt for third party sale from the beginning. Appellant, Yash Agro issued a letter dated 22.05.2008 to the

MSEDCL informing that the EPA dated 25.10.2004 would stand terminated as a natural consequence with immediate effect.

12.1.2. MSEDCL vide letter dated 21.05.2008 stated that the Commission had ruled that clause 7.4 of the EPA be deleted. Hence, there was no provision for third party sale and further the Appellant, Yash Agro should expedite commissioning of its plant and start feeding the agreed power to the grid as per the EPA. The Appellant, Yash Agro approached the Commission for action under section 142 read with section 149 of the Act. The commission through its order dated 08.08.2008 upheld the interpretation of MSEDCL. Aggrieved by the Order, the Appellant, Yash Agro has filed this appeal No. 95 of 2008.

13.0 From the above, the main issue that emerge from the controversy is whether the Appellants have a right to third party sale without obtaining any 'No-Objection Certificate' (NOC) from the MSEDCL for sale of power generated by their respective plants. The contention of the appellants can be summed up as under:

(a) Clause 7.4 of the EPA dated 02.09.2002, uses the term **'third party sale can be allowed',** which admittedly is contrary to and in conflict with the directions issued by MERC in order dated 15.07.2002 (clause 27.4.3). Hence, the term **'can be allowed'** has to be construed as **'should be allowed'.**

(b) Energy supplied by the Appellant, PSKL during the period from 18.03.2007 to 05.04.2007 was during the testing and commissioning period and does not amount to commercial supply.

(c) The rate of Rs. 3.05 per KWh stated by the Appellant, PSKL in its bills is of no relevance, as clause 5 (b) states that the bills shall be paid @

90% of the average realization rate of MSEB during the previous financial year and is known only to MSEDCL.

(d) Stipulations of EPA of 02.09.2002 which were inconsistent with the provisions of the Electricity Act, 2003 were inoperative in view of the rights created in favour of the Appellant, PSKL by virtue of section 10(2) of the Act.

(e) Whether by virtue of section 185 (2) (a) of the Act, stipulations of clause 7.4 of EPA dated 02.09.2002 can be made operative despite being inconsistent with the provisions of section 10(2) of the Act?

(f) The term '**beginning'** has to be construed in tune with provisions of the EPA and the stages contemplated therein. EPA envisages two phases namely testing and commissioning phase and post-commissioning phase. The term '**from the beginning'** means any time from the beginning of the commercial operations and that the term is not '**at the beginning'**.

(g) Collection of Unscheduled Interchange (UI) charges by MSEDCL tantamount to acceptance of the right of the Appellant, PSKL for third-party sale.

(h) The commission in the impugned order (relating to Appellant, Yash Agro) came to the conclusion that '**from the beginning'** means before execution of EPA. The Appellant, Yash Agro contends that in such situation what is the propriety of clause 27.4.3 of the EPA and paragraph 2.24 of the order dated 16.08.2008 and also why such clauses were there at all?

(i) It is the case of the Appellant, Yash Agro that it is the cardinal principle of law that the findings recorded in the order can not be reversed,

varied or modified in the absence of any appeal or review petition. The proceedings initiated by the Appellant, Yash Agro were for the enforcement of the Commission's order dated 06.05.2008.

14.0 **Contention of Respondent No. 5, MSEDCL.**

14.1 MSEDCL made the following submissions:

14.1.1 The project holder can be permitted to sell their surplus power to third party at the beginning only, which means that MSEDCL (erstwhile MSEB) should not enter into agreement for purpose of purchasing power from such projects;

14.1.2 The commissioning of the plant achieved on 18.03.2007; supply of power generated during the period from 18.03.2007 to 06.04.2007 was commercial power and not testing power; this is further supported by Appellant, PSKL raising the bills @ Rs. 3.05 per KWh;

14.1.3 The Appellant, PSKL illegally entered into Agreement for sale of power to Respondent No.3, Reliance Energy Trading Company Ltd respondent no. 3 on 30.01.2007;

14.1.4 The term '**can be allowed'** deemed inserted with mutual consent of both the parties in Clause 7.4 of the EPA executed between PSKL and MSEDCL. The EPA of Yash Agro, however, retains the term 'should be allowed.

14.1.5 The parties can not be allowed to go back on the EPA by making reference to Section 10 (2), 86 (e) and 185 (2) (a) of the Act;

14.1.6 Appellants' claim of third party sale as a right is not justified and is to be referred as a breach of contract. The option for sale of power to third party from the beginning means that MSEDCL should not enter

into agreement for purchase of power from the Appellants. Since the Appellants have entered into agreement with MSEDCL, the sanctity of 'should be allowed' does not exist.

14.1.7 The State Transmission Utility or the Transmission licensee can not grant non-discriminatory transmission open access without verification of contracts/agreements as per section 32(2)(a) of the Electricity Act, 2003.

DISCUSSION AND ANALYSIS

15.0 Before proceeding with our analysis we find it appropriate to address certain contention of the learned counsel for the Appellant, PSKL in support of which he had cited a number of authorities.

15.1 The learned counsel for the Appellant, PSKL has cited the following cases

(a) Commission's order dated 07.11.2007 in the case of **M/s Dodson Lindblom Hydero Power Pvt. Ltd.** Vs**. MSEDCL**

(b) This Tribunal's common Judgment dated 02.06.2006 in appeal Nos. 1,2,5,6,7,8,9,10,12,15,16,17,18,19,20,21,22,34,44,47,48, 49, 50, 52, 58, 67 and 80 of 2008 in the case of **Small Hydro Power Developer Association And Others** Vs. **Andhra Pradesh Electricity Regulatory Commission and Others"**

(c) This Tribunal's judgment in Appeal No. 4, 5, 6, 8, 9, 10, 12, 13, 14 and 23 of 2006 in the matter of **Transmission Corporation of A.P. and Anr.** Vs. **A.P. State Electricity Regulatory Commission an Anr.**

15.2 As regards the case cited at (a) above the issue relates to whether the Commission's order dated 09.11.2005 confirming the first right of refusal of purchase of electricity generated by small hydro purchase to MSEDCL is in conflict with Electricity Act, 2003. MERC had rightly corrected the position as the regulations are to be consistent with the Act. This, therefore, cannot be applied in the case under consideration.

15.3 The case cited at (b) above has decided that the Regulatory Commission has authority to alter or change the PPA entered between the Non Conventional Energy Developers and Electricity Board/ A.P. Transco as long as it is to promote the development of Non-Conventional and Renewal power projects.

15.4 The case mentioned at (c) above relates to Non Conventional Energy Developers and *inter-alia* decided that the PPA executed between Non Conventional Energy Developers and A.P. Transco / Discom cannot be reopened for incorporating the amendments approved by the Commission, provided the Commission is convinced that the amendment would help to sustain the operational stability of such purchase and are in conformity with Section 86(i)(e) and Section 61(h) of the Electricity Act, 2003.

15.5 The case before us is different. Here the parties have a valid EPA in place which had created vested rights in the parties. These vested rights can be taken away either by the specific direction of the legislatures or with the mutual consent.

15.6 There is no dispute in the fact that the Appellants, PSKL and Yash Agro have established co-generation power project and biomass based power project respectively. Both types of projects fall under the ambit of the policy for promoting non conventional energy based project with incentives of third party sale. Also there is no dispute in the fact that Commission through its order dated 15.07.2002 determined the power projects and procurement process including

the principles for procurement of power by the MSEB from co-generation stations using the non fossil fuel and prescribed guidelines to aid the State Government in the formulation of state policy in this matter. The fact that the principles of EPA have been formulated by the Commission by its order dated 15.07.2002 is also not in controversy. The said order admittedly directed the MSEDCL to modify model EPA which reflect the tariff provisions and the principles of EPA before executing the EPA with the developers. Admittedly Clause 27.4.3 of the commissions order dated 15.07.2002 provided that the **Developers of the co-generation projects should be allowed to sell energy generated by the co-generation projects to third party sale from the beginning itself, if they chose to do so.** However, in such a situation there should be no liability on the part of the MSEB/MSEDCL to mandatorily off-take the energy generated by the projects.

16.0 In the light of the above undisputed facts, we have to consider the submissions made on behalf of the Appellants that they did not require a No-Objection Certificate' from MSEDCL before entering into a power purchase agreement with a third party.

17.0 The EPA at clause 7.4 provides that *'the developer of the Co-generation projects can be allowed to sell the energy generated by the Co-generation project, to third parties from the beginning itself, if they choose to do so. However, in such a situation, there should be no liability on the part of the MSEB to compulsorily off-take the energy generated by the project".* The issue is whether the developer can choose to sell the power to third party without the consent of the MSEDCL.

18.0 The above clause of the EPA gives an indication that even after entering into the agreement; the parties recognized the possibility of the Appellant, PSKL opting to choose to sell power to the third party, other than in the event of any default by MSEDCL. However, the option has to be chosen at the 'beginning itself'. This means that the option may be chosen after execution of the EPA but

before a certain event so that the effects can be given to the contents of clause 7.4. Therefore, the stage of '**beginning itself**' would be occurring after the EPA has been executed.

19.0 The Appellant, Yash Agro contended that if after entering into EPA, the Appellant, Yash Agro can not opt for a third party sale in any case without consent of MSEDCL then what is the propriety of clause 27.4.3 of the EPA and paragraph 2.24 of the order dated 16.08.2008 and also why such clauses were there at all. We find force in this contention. The clause indicates that there is a possibility of third party sale in the future after execution of the EPA. If we take the view that the possibility would happen only with the mutual consent of both parties, then there was no need to have such a clause in the EPA as even in the absence of such a clause, the parties can agree for any amendment or addition or deletion of any clause of the EPA, within their rights, with mutual consent.

20.0 The Appellant, Yash Agro has submitted that on 19.10.2002, MSEB formulated the revised Policy for purchase of power from co-generation projects in line with the Order dated 15.07.2002 of the Commission. Clause 16 of the said Policy provided that *'the developer of the co-generation projects shall be allowed to sell the energy generated by the co-generation project to third parties from the beginning itself, if they choose to do so.'* The aforesaid revision was forwarded to the Commission also.

21.0 The Appellant, PSKL also submitted that in one instance (of M/s Kay Pulp and Paper Mills Ltd, one of the participants in the proceedings before the Commission leading to the Order dated 15.07.2002 and 16.08.2002), MSEB has incorporated the provisions relating to third party sale with words '**should be allowed'** in place of '**can be allowed'** in the EPA amended on 21.05.2003.

22.0 In our considered opinion, MSEDCL can not take opposite approaches in respect of the option of third party sale; i.e. in some cases allowing the term '**should be allowed'** and in some case **'can be allowed'**, as the source of validation for both EPA are out of the same Policy of the State Government and Orders of the Commission. Hence, in our view, the developers have a right of third party sale in terms of the EPA. This view is also supported by the intention behind the Policy of the State Government to encourage energy generation from renewable and co-generation power projects. One of the reasons behind seeking tie-up of power sale with the state owned entities was to make these projects bankable for financing. Unless the projects are bankable, attracting investment to power sector and increasing generation capacity would not be possible. Therefore, to meet the objectives, it is desirable that the state owned entities do not discriminate amongst the developers and extend the option of third party sale to similar developers on equal footing.

23.0 However, the key words are '**from the beginning itself'**. According to the Appellant, PSKL the term '**from the beginning itself**' signifies, beginning with the commercial supply from the project. The Appellant, PSKL has contended that the supply during the period from 18.03.2007 to 05.04.2007 was during the testing and commissioning period and does not amount to commercial supply. Per contra, MSEDCL has submitted that the commissioning of the plant achieved on 18.03.2007; and supply of power generated during the period from 18.03.2007 to 06.04.2007 was commercial power and not testing power. The Commission has held the said supply to be commercial in nature.

24.0 The Appellant, PSKL also referred to paragraph 2.24 (quoted earlier) of the Order dated 16.08.2002 of the Commission. The said paragraph also does not throw light on the meaning of the term '**from the beginning itself'**.

25.0 Clause 7.4 of the EPA does not differentiate between the nature of supplies i.e. whether the supply is prior or post commissioning of the project

insofar as the rights of the Appellant, PSKL to opt for third party sale are concerned. In our view, after the Appellant, PSKL has started supplying electricity to the Respondent no. 5, MSEDCL in accordance with the EPA, the Appellant PSKL has lost the right to opt for a third-party sale, available under clause 7.4 of the EPA, without the mutual consent of the Respondent. The term '**from the beginning itself'** under the circumstance would mean before any supply of electricity to the buyer begins from the plant. It is inconsequential as to when the Appellant, PSKL wants to commence supply to third-party after COD of the project.

26.0 Looking at from another angle, if we were to construe that '**from the beginning itself'** implies beginning anytime before the commercial operation of the project commences without any consent of the MSEDCL, it would mean that the buyer, MSEDCL cannot be sure of its sources of purchases till the commercial operations actually begins. This would make the EPA one-sided in the sense that till the last moment, only the developer would be in a position to decide whether to supply the commercial generation to the buyer as per the EPA or not. In such a situation the buyer can not make arrangements to forecast its sources for purchase of electricity. Such a scheme is not reflected from the provisions of the EPA.

27.0 Where the developer has not started supplying any energy under the EPA, the developer can opt to choose for a third party sale without the consent of MSEDCL. The reason for this is that if in a situation the developer is not having the option for a third party sale, then effectively the clause no. 27.4.3 providing for option to choose for third party sale is inconsequential qua the parties and then why such a clause would be retained in the agreement.

28.0 It may be pertinent to note that in case of Commission's order dated 08.08.2008 in respect of Yash Agro the following observations have been made:

"This undoubtedly goes on to prove that Clause 7.4 of the EPA should not have been there at all as the EPA was supposed to be and required to be in accordance with the orders passed by the Commission dated July 15, 2002 and August 16, 2002.

….

That Clause 7.4 in the EPA has been incorrectly introduced. If a developer had opted to sell to the third party from the "beginning itself" then the developer would not have entered into the EPA itself since EPA is a contract to buy and sell binding both the parties.

….

That Clause 7.4 of the EPA dated October 25, 2004 is invalid, inoperative and unenforceable as it is inconsistent with the Principles of EPA approved by the Commission in its Order dated August 16, 2002.

29.0 we are of the view that the above findings of the Commission may be applied for future agreements but not in the instant cases where the parties have already executed the EPAs. Once the clause has been brought on to the EPA, the remedy is not merely to delete the same to the detriment of one party. Now the remedy is to give effect to the clause to the extent possible without violating any of the statutory provisions.

30.0 Therefore, in our opinion, where the developer has not started supplying any energy under the EPA, the stage is still before '**the beginning itself**', and the developer can opt to choose for a third party sale without the consent of MSEDCL. However, where the developer has started supply of energy to MSEDCL in terms of the EPA, regardless of it being infirm (during testing and commissioning phase, prior to achieving commercial date of operation for the project) or otherwise, the developer has given up its right of third-party sale.

31.0 In view if the above, Appellant, PSKL is not having the right of sale of power to third party, available to them as they have already started supply of

power from the project to MSEDCL. Appellant, Yash Agro can choose to opt for third party sale option as given to them in the EPA since any supply from the project has not yet commenced. Accordingly, Appeal No. 95 of 2008 is allowed and Appeal No. 02 of 2008 is liable to be dismissed.

32.0 Before we part with the judgment we will address to the issues raised by Appellant, PSKL before the Commission which have been kept pending for decision. We observe from the Order dated 17.12.2007 of the commission that the Appellant, PSKL had following four issues pending before the Commission:

> "*(i) Pass appropriate Orders and/or direction to the Respondent No. 4 and Respondent No. 5 not to deny the Open Transmission Access to the petitioner for transmission of energy generated at their co-generation unit, in the matter of implementation of the agreement between petitioner and Respondent No. 3.(ii) Also pass appropriate Orders and /or direction to the Respondent No. 1,Respondent No. 4 and Respondent No. 5 not to create hurdles for transmission and sale of energy by the petitioner and Respondent No. 3.*
>
> *(iii) Also pass appropriate Orders and / or direction to the Respondent No. 4 and Respondent No. 5 not to demand for double charges and to avoid double charging thereby making demand order 220 KV side, in addition to the supply on 33 KV for auxiliary consumption and standby at the generation unit of the petitioner.*
>
> *(iv) The petitioner also prayed for direction against the Respondent No. 4 that no separate levy can be demanded by Respondent No. 4, as the transmission charges and wheeling charges are now paid by the petitioner*.
>
> ……"

'However, subsequently, Notes of Argument dated November 21, 2007 have been filed wherein PSKL has sought to press only prayer clauses (i) and (ii).'

33.0 Accordingly, the Commission decided issues at (i) and (ii) above. The Appellant, PSKL is at liberty to take up the other issues, which have not yet been decided by the Commission, appropriately.

Conclusion

34.0 In view of the above, we have reached the following conclusion:

(a) In the case where the Developer has not commenced supplying any energy under the Energy Purchase Agreement, it is still in a stage before '**the beginning itself**' and the Developer can opt to choose for a third-party sale without the consent of the licensee, MSEDCL. However, where the supply, regardless of its being infirm or otherwise, has commenced the Developer is deemed to have given up its rights to third-party sale. Accordingly, the Appellant, PSKL which has commenced supply from 18.03.2007 has given up its right to third party sale from that date. The aforesaid rights can be restored to the Appellant only if the parties of the agreement mutually agreed to it. The Appellant, Yash Agro, however, has full rights to third party sale provided by the Clause 7.4 of its EPA as it did not commence any supply to the respondent, MSEDCL.

(b) The Commission's impugned order dated 08.08.2008 against which M/s Yash Agro Energy Ltd. has filed Appeal No. 95 of 2008 is set aside and the Appeal is allowed.

(c) Appeal No. 02 of 2008 filed by M/s Purti Shakhar Karkhana Ltd. against the impugned order 17.12.007 passed by the Commission is

dismissed. Appellant, however is at liberty to approach the Commission for decision on the pending issues.

35.0 The Appeals are disposed of with no order as to costs.

(A. A. Khan)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated : 24th March, 2009

REPORTABLE / NON REPORTABLE